

In the Matter of)
)
Structure and Practices of the) CG Docket No. 10-51
Video Relay Service Program)

To: The Commission

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SUMMARY

Gallaudet University respectfully requests that the Commission extend the stay of the effective date of Section 64.604(c)(5)(iii)(N)(1)(iii) of the Commission's Rules for an additional 90 days. The Commission only recently adopted a Further Notice of Proposed Rulemaking ("*FNPRM*") in this proceeding. The proposals contained in the *FNPRM* would materially change how VRS services are provided. Prior to the *FNPRM*, a reasonable reading of the Commission's VRS Rules would have lead operators to believe that they were allowed a certain amount of discretion as to how to staff and operate their call centers. In particular, the Rules as written supported many operators' belief that subcontracting arrangements were permissible, as long as they were between FCC-certified VRS operators. The *FNPRM*, however, casts doubt upon the interpretations of the Rules held by many operators who are in the midst of preparing their certification applications.

With only a little more than two weeks remaining until Section 64.604(c)(5)(iii)(N)(1)(iii) becomes effective, prospective applicants are faced with uncertainty as to the qualifications that they must meet in order to become certified. The result will likely be the filing of good faith but defective applications, and the potential impairment of VRS services. Many VRS call centers will have difficulty meeting the November 15 certification deadline absent technical and other support from previously certified operators. If existing, qualified call centers cannot be certified by the FCC by November 15th, it is conceivable that the remaining VRS operators who are already certified will lack adequate time to hire the interpreters and other personnel necessary to continue handling current call volumes at the speeds to which their users have become accustomed. Delays in completing VRS calls would harm the very consumers that the VRS program was designed to serve, while causing unnecessary hardship to untold scores of

VRS interpreters. In contrast to this potential loss of services, no party will be harmed by maintaining the *status quo* until the critical issues regarding eligibility for certification and the operating requirements for certified VRS providers are settled.

Additionally, although OMB recently approved the information collection requirements contained in the new VRS certification Rules, that approval has not yet been published in the Federal Register. Those requirements are therefore not yet effective. In light of this fact, the Commission recently extended the expiring certifications of certified VRS providers. The fair and efficient administration of the Rules warrants extending similar relief to new VRS certification applicants.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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To: The Commission

MOTION TO EXTEND STAY

Gallaudet University (“Gallaudet”), through its attorneys, and pursuant to Section 1.46 of the FCC's Rules, 47 C.F.R. § 1.46, hereby moves the Commission to further extend the stay of the effective date of Section 64.604(c)(5)(iii)(N)(1)(iii) of the Commission’s Rules, as adopted in *Structure and Practices of the Video Relay Service Program*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 5545 (2011) (“*VRS Fraud Order*”). The Commission previously stayed the effective date of the subject Rule on its own motion until October 1, 2011. *Structure and Practices of the Video Relay Service Program*, Order Suspending Effective Date, FCC 11-86 (rel. May 31, 2011) (“*VRS Stay Order*”). On September 30, 2011, in response to Gallaudet's “Motion to Extend Stay” (file with the FCC on September 9, 2011), the FCC extended the stay until November 15 of 2011. *Structure and Practices of the Video Relay Service Program*, Order Extending Effective Date, FCC 11-145 (rel. September 30, 2011) (“*Stay Extension Order*”).

By this Motion, Gallaudet requests that the effective date of the subject Rule be extended for an additional 90 days, to allow consideration of the critical issues raised in the FCC's recently adopted Further Notice of Proposed Rulemaking (“*FNPRM*”). Given that the *FNPRM* raises new and novel compliance and application issues with respect to the operation of VRS centers, it

will be a practical impossibility for anyone interested in becoming a certified VRS Operator to comply with the new rules by November 15th. Moreover, the “seamless transition to certification” that is one of the FCC's regulatory objectives in its VRS regulatory overhaul, *Stay Extension Order* at ¶4, simply cannot be accomplished by November 15 in light of the FCC's most recent order.

Also, as a practical matter, the new VRS certification rules have not yet become effective, because Office of Management and Budget approval of the new information collection requirements has not been published in the *Federal Register*. In light of this fact, the FCC recently extended the certification period for previously certified VRS operators with authorizations set to expire November 4, 2011. *Public Notice*, DA 11-1795, “Consumer and Governmental Affairs Bureau Extends Expiring Certifications for Certain Providers of Video Relay Service and IP Relay Service.” (October 26, 2011). By the same reasoning, it makes practical sense for the FCC to extend the effective date of the new VRS certification requirements until, at the earliest, January 4, 2012. In support hereof, the following is respectfully shown:

I. Background.

The relevant rule implicated in this Motion was adopted in the *VRS Fraud Order*; *inter alia*, the rule imposes additional restrictions and safeguards to combat fraud in the VRS program. Under new Section 64.604(c)(5)(iii)(N)(1)(iii), no entity providing VRS services is permitted to subcontract with a third party for interpretation or call center services, unless that third party is also an eligible provider of VRS.

Gallaudet, like many other entities, operates VRS interpreting services as a sub-contractor to a certified VRS Operator; it is interested in applying to the FCC to become a certified VRS Operator in its own right. In its prior Motion for Stay, Gallaudet sought an

extension of the effective date of this rule because the FCC's new information collection requirements had yet to be approved by the Office of Management and Budget (“OMB”). Also, various petitions for reconsideration and requests for clarification were still pending at the time, the outcome of which would directly bear on VRS Certification application requirements. Acknowledging these facts, the FCC stayed the effective date of the rule for an additional 45 days, through November 15, 2011, presumably under the assumption that the OMB would approve the new rules by then.

On October 17, 2011, the FCC addressed the petitions for reconsideration, and clarified certain questions that had been raised regarding the VRS certification process. *Structure and Practices of the Video Relay Service Program*, Memorandum Opinion and Order, Order, and Further Notice of Proposed Rulemaking, FCC 11-155 (rel. October 17, 2011) (“*FNPRM*”). In resolving some of the issues that had been raised under the Paperwork Reduction Act, the FCC cleared the way for OMB approval of the VRS Certification rules and requirements; indeed, OMB approval was received a few days later, on October 20, 2011.

At the same time that the FCC resolved certain ambiguities regarding its new VRS rules; however, it highlighted several new uncertainties in the *FNPRM*. For one thing, the FCC determined that it might need to “modify” section 64.604 (c)(5)(iii)(N)(1)(iii) of its Rules, to allow an eligible VRS provider to “contract with or otherwise authorize another eligible provider to provide CA services or call center functions on its behalf *only* when such arrangements are necessitated by an unexpected and temporary surge in call traffic due to exigent circumstances” *Id.* at ¶ 32 (emphasis supplied). The FCC also sought comment on “the specific types of exigent circumstances that would warrant subcontracting” *Id.* at ¶ 33. And, the FCC asked for comment on whether it should recognize any “limited exemptions ... to our general

prohibition on an eligible provider contracting with or otherwise authorizing any third party from providing interpretation services or call center functions on its behalf” *Id.* at ¶ 36.

II. Problems Created By The FNPRM.

The *FNPRM* has proposed substantive changes to the recently adopted VRS application and certification regulatory requirements on the very eve of the deadline for compliance with the new VRS certification rules. The FCC has not proposed some simple “clarification” of its rules; rather, it has proposed changing the very manner in which VRS services must be provided to the public, in ways that could not have been anticipated from its previous rulemaking orders or a plain reading of the rules.

Although these proposed rule changes will be subject to public comment, and they have not yet been adopted as law, the promulgation of these rule changes creates considerable compliance, planning and operational difficulties for the entire VRS services community, at precisely the time when plans are being finalized to comply with the new VRS rules. Also, the proposed rules are a distinct departure from the overwhelming trend in the telecommunications industry toward sub-contracting or seeking third party assistance for a variety of basic service and support requirements. The immediate impact of this latest proposal, if not stayed or deferred, will be disruption of VRS services and degradation of VRS service quality, to the detriment of tens of thousands of deaf and hard of hearing individuals.

Prior to the adoption of the *FNPRM*, a fair reading of the FCC's new VRS rules would lead one to believe that to become a certified VRS operator one had to be a “facilities-based” service provider; there is a specific rule requirement that VRS operators own or lease Automatic Call Distribution equipment. *See* 47 C.F.R. 64.604(b)(4)(iv). In most other respects; however, the rules allowed a certain amount of discretion as to how a given VRS operator could staff and operate its call center. For instance, the new VRS certification application rules specifically

allow applicants to explain how each “core call center function” will be provided, and whether the technology and equipment used for those functions will be “owned, leased or licensed (and from whom if leased or licensed)” 47 C.F.R. § 64.606(a)(2)(ii)(A)(4).

Given the plain language of these rules, it is not surprising that at least two of the nation's largest telecommunications carriers, AT&T and Sprint, interpreted them to allow VRS operators to enter into “subcontracting and other arrangements” for core VRS services, so long as the arrangements were between regulated, certified VRS operators. *See FNPRM* at ¶ 31. Not only is that interpretation consistent with a plain reading of the FCC's rules, it is consistent with the overall policy objectives of the new VRS regulatory regime. Since all of the parties to these arrangements would be regulated by the FCC, there would be little opportunity for fraud or service quality issues.

The *FNPRM* has suddenly and inexplicably brought these reasonable assumptions into question, at precisely the least opportune time for VRS operators and call centers, who are finalizing plans to come into compliance with the new VRS regulations. The acute dilemma created by the FCC is that now no one knows how to interpret the FCC's VRS certification regulations; rather, anyone not currently certified as a VRS operator will have to submit their VRS certification applications based on little more than informed hunches. If the FCC's interpretation of its rules should differ from the VRS operational plans that will be submitted prior to November 15th, there is a real chance that these good faith applications will be denied or delayed. Even if the FCC allows at least interim certification authorizations in the coming weeks, there is a real risk of squandered investments and resources should the agency subsequently change the VRS rules, forcing changes in VRS operations.

Given that there clearly is some doubt at the FCC as to what was intended by its own VRS operations rules, the scenario now is no different than the one that led the FCC to grant Gallaudet's prior Motion for Stay. Given the confusion or uncertainty that now overhangs the VRS certification and operational requirements, the common sense approach would be for the FCC to postpone enforcement of these new rules for at least 90 days, to allow time for the agency to clarify these obligations. In light of the critical importance of VRS services to so many, and the interests of numerous entities who wish to provide certified VRS services to the public, this is a modest and prudent request. A brief extension of the stay will give the FCC adequate time to receive comments on these critical questions and to provide clear guidance to the deaf community as to how certified VRS operators will be allowed to offer their services to the public.

III. A Further Stay Of The Effective Date Is Warranted And Would Serve The Public Interest.

In light of the looming effective date of Section 64.604(c)(5)(iii)(N)(1)(iii) of the Rules, and given the uncertainty created by the FCC's recent *FNPRM*, the public interest warrants that the current stay be extended for an additional ninety (90) days. A grant of this request will be in the public's interest in several respects.

First of all, several qualified VRS centers, such as Gallaudet, have already made plans to contract with other, certified VRS operators to receive various forms of technical and other support for their newly formed, full-service VRS centers. At the same time, previously certified VRS operators had planned on working with newly certified VRS call centers, supplementing their interpreting staff with interpreters that will be working for newly certified VRS centers. None of this could be considered a surprise to the FCC or to anyone in the deaf community. The fact that companies as large as Sprint and AT&T had contemplated similar plans, *FNPRM* at

¶31, should itself be proof that this is not a regulatory problem, despite the *FNPRM*'s statements to the contrary. Given the relatively small size of Gallaudet and of similar VRS call centers, and the fact that until recently they had no viable means of becoming certified VRS operators on their own, it stands to reason that for some period of time they would want to work with larger, established VRS operators, as a means of ensuring service quality and regulatory compliance during the formative period of their operations.

At the same time, it is by no means apparent that the FCC should be imposing new “self-sufficiency” requirements on the VRS community, when it imposes no such requirements on any other segment of the telecommunications industry. Today, there is not a single telecommunications company extant that provides all of its “core services” using only in-house employees; indeed, many of these core communications services, such as customer support and critical 911 services, are provided by third party companies that are not even subject to the FCC’s jurisdiction or regulations.

This important substantive issue, and critical questions of regulatory fairness, will surely be addressed in further detail during the FCC rulemaking process. For now, with a November 15 deadline looming, it suffices to note that many VRS call centers have relied in good faith on the rules that are currently in place in making their plans to become certified VRS operators. Gallaudet's situation is by no means unique; a review of several VRS certification applications on file with the FCC reveals that there are many entities that have planned on receiving some level of support from other qualified VRS operators. The fact that these plans have been disclosed to the FCC is further proof that these sub-contracting arrangements, between fully regulated entities, were never intended to be a subterfuge or an end run around the FCC's new VRS regulations.

The uncertainty created by the *FNPRM* means that only those entities that already hold VRS certifications will be confident that they can continue providing services to the public after November 15, without violating the FCC's rules. This will create considerable problems for the deaf community, who will have fewer VRS services available to them one month from now. As with all telecommunications services, VRS consumers have their own preferences with respect to VRS service providers; many in the deaf community have been expecting that their preferred service providers will become certified VRS operators by November 15. Moreover, absent a stay, many VRS certification applications will have to be withdrawn or will not be submitted in the first place.

In addition to the adverse impact that these developments may have on VRS service options for consumers, the quality of VRS services may suffer if this stay request is not granted. Many VRS call centers will have difficulty meeting the November 15 certification deadline absent technical and other support from previously certified operators. If existing, qualified call centers cannot be certified by the FCC by November 15th, it is conceivable that the remaining VRS operators who are already certified will lack adequate time to hire the interpreters and other personnel necessary to continue handling current call volumes at the speeds to which their users have become accustomed. Delays in completing VRS calls would harm the very consumers that the VRS program was designed to serve, while causing unnecessary hardship to untold scores of VRS interpreters.

Disruptions or degradations or any unnecessary diminution of service offerings to deaf and hard-of-hearing individuals are contrary to the Communications Act's command that the Commission ensure that relay services are "available" to such individuals "in the most efficient manner[.]" 47 U.S.C. § 225(b)(1). By contrast, a brief, additional delay in the effective date of

Section 64.604(c)(5)(iii)(N)(1)(iii), until the Commission can provide clarification about its VRS operator requirements, will maintain the FCC’s goal of “seamless availability of relay services” in accordance with the Communications Act and the public interest.

Compared to the harm that will befall the deaf community if the stay is not extended, there is no evidence that a grant of this request will undermine any regulatory goals or public policies. Given the intense regulatory scrutiny under which the VRS program now operates, no one would attempt to violate the VRS reimbursement rules during the next, brief rulemaking period (and that risk is inherent in the system even if the criminally-inclined become certified VRS operators in the next few weeks). Moreover, if it turns out that the FCC adopts even stricter VRS certification requirements, there is no point in squandering FCC staff time and resources processing applications that might be found defective under the new rules.

The stay should be extended as a matter of fundamental fairness. The “further clarification” that the *FNPRM* has proposed comes so late in the application preparation and business planning stage as to be entirely unfair to the VRS community as a whole. The *FNPRM* was released less than a month before the deadline for non-certified VRS call centers to become certified. These are extremely complicated undertakings, the FCC's compliance requirements for VRS operators are extensive, and anyone interested in providing VRS services to the public will have to make substantial commitments in hiring and training qualified interpreters, FCC regulatory compliance and installing the network architecture necessary to handle VRS calls. There is no practical way that qualified call centers can revise their business and operational plans between now and November 15th, even if they correctly guess as to how the FCC will ultimately interpret or revise its VRS operator rules.

IV. Effective Date Of The New Rules Warrants A Stay.

As a practical matter, the new VRS certification rules have not yet become effective because Office of Management and Budget approval of the new information collection requirements has not been published in the Federal Register. In light of this fact, the FCC recently extended the certification period for previously certified VRS operators with authorizations set to expire November 4, 2011. *Public Notice*, DA 11-1795, “Consumer and Governmental Affairs Bureau Extends Expiring Certifications for Certain Providers of Video Relay Service and IP Relay Service.” (October 26, 2011). By the same reasoning, it makes practical sense for the FCC to extend the effective date of the new VRS certification requirements. This will place the application process for new and renewed VRS operators on roughly the same regulatory track, and ensure that FCC staff has adequate time to process applications for VRS certification.

CONCLUSION

For all the foregoing reasons, Gallaudet respectfully requests that the Commission grant this Motion to Extend Stay, and extend the effective date of Section 64.604(c)(5)(iii)(N)(1)(iii) of the Commission's Rules for an additional ninety (90) days, up to and including Wednesday, February 15, 2012.

Respectfully submitted,

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Date: October 31, 2011

CERTIFICATE OF SERVICE

I, Lula Robinson, a legal administrative assistant in the law firm of Venable LLP, do hereby certify that on this 31st day of October, 2011 copies of the foregoing Motion to Extend Stay were sent via electronic mail to the following:

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